

Radio, Inc., supra, 5 FCC Rcd at 4562-3 (net worth of \$475,500 supported \$198,867 cost budget); Capitol City Broadcasting Co., 8 FCC Rcd 8478, 8480 ¶ 9 (1993) (net worth may provide reasonable assurance of financial qualification "if the assets are several times the value of the cash which such assets are relied upon to yield").

59. In sum, Ms. Selznick's 1991 financial certification was based on an oral loan commitment from a very good friend and professional colleague whose net liquid assets she personally knew at the time of her certification to be sufficient to meet her \$360,070 cost budget. Selznick's 1991 financial certification was not false. Port Huron Family Radio, Inc., supra.

B. The Misrepresentation Issue/Forfeiture Proceeding

60. The Presiding Judge added a misrepresentation issue to determine whether Ms. Selznick certified in her 1991 application as being financially qualified when she knew that she was not. See M.O. & O., supra, at ¶ 4. The ALJ also issued a "Notice of Forfeiture" under 47 CFR § 1.80(f)(a) because it appeared to him that Ms. Selznick "did not possess documentation of financial qualifications" when her application was filed on December 16, 1991. Id. at pp. 3-4.

61. Even assuming arguendo that Selznick was not financially qualified when her application was filed on December 16, 1991, ^{8/}

^{8/} But see discussion, supra, at ¶¶ 39-59.

there is no evidence -- much less substantial evidence -- that Ms. Selznick "knowingly" made a false financial certification in her 1991 application. Ms. Selznick's 1991 financial certification was based on:

(a) her compilation of a \$360,070 cost budget that considered every material component of constructing and initially operating her proposed El Rio FM station;

(b) the 1991 commitment from Mr. Dailey to loan \$360,070 for her proposed El Rio project, which was corroborated by Mr. Dailey's testimony;

(c) Ms. Selznick's "item-by-item" review of Mr. Dailey's then-current financial statement, prior to her certification, to confirm the availability of at least \$360,070 in net liquid assets for the proposed loan;

(d) Ms. Selznick's review, prior to her certification, of the Instructions to FCC Form 301;

(e) Ms. Selznick's discussions with her communications counsel, Peter Tannenwald; and

(f) the documentary evidence, which was "on hand" and available to Ms. Selznick, of Mr. Dailey's ability to loan her up to \$360,070.

62. In sum, there is no sustainable basis on this record for concluding that Ms. Selznick "knowingly" misrepresented her financial qualifications in her 1991 application. ^{2/} See Pens-

^{2/} On January 4 1994, Selznick filed a Motion to Delete Forfeiture Proceeding. That motion will become moot if the misrepresentation issue is resolved in favor of Selznick.

acola Radio Partners, 8 FCC Rcd 7225, 7237 ¶ 111 (ALJ Frysiak 1993); Pleasant Hope Broadcasting Co., L.P., supra, 6 FCC Rcd at 6555-6 ¶¶ 12-3.

II. PRESENT FINANCIAL QUALIFICATIONS

63. On August 30, 1993, Selznick filed an Amendment to update her application by reporting a change in her cost budget and a revision to her financing plan. The Presiding Judge denied the Amendment and rejected Selznick's revised financial proposal on a number of grounds.^{10/} Thus, when the ALJ granted Mr. Clanton's Petition to Enlarge and added false certification/misrepresentation issues in his September 30, 1993 decision, the Judge also added an issue to determine whether Selznick is financially qualified at present. See M.O. & O., supra, at ¶ 3.

64. Following the ALJ's denial of Selznick's August 30, 1993 Amendment, Selznick has submitted a Revised Amendment and Petition for Leave to Amend.^{11/} As discussed in the pending Petition, the Amendment should be accepted.

65. First, the Revised Amendment meets the "good cause" test for post-designation amendments. See Erwin O'Connor Broad-

^{10/} See M.O. & O., FCC 93M-583, released September 13, 1993.

^{11/} See Petition for Leave to Amend, filed by Selznick on January 6, 1994. Because of an inadvertent collation problem with another pleading that also was filed on January 6, 1994, Selznick filed a "Corrected Petition for Leave to Amend" on January 13, 1994, to which the "Revised Amendment" was properly attached.

casting Co., 22 FCC 2d 14-43 (Rev. Bd. 1970). The Revised Amendment updates Selznick's pending application to report changed circumstances with respect to her cost estimates and her financing plan and, under 47 CFR § 1.65, is required to be filed. ^{12/} In addition, the acceptance of the Revised Amendment would not require the addition of new issues; rather, it would resolve one of the three issues added against Selznick. Moreover, the Revised Amendment was diligently filed within six weeks after the completion of discovery. Cf. WCTO, Inc., 56 RR 2d 1539, 1546-50 (Rev. Bd. 1984). ^{13/} In addition, the acceptance of the Revised Amendment would neither prejudice Mr. Clanton nor delay this proceeding, which has been completed and the record of which has been otherwise closed. ^{14/} Finally, it is clear that, because the Revised Amendment concerns only basic qualifications issues -- not comparative issues -- Selznick would gain no undue

^{12/} Thus, the Revised Amendment is involuntary. Indeed, assuming that Selznick has proved her financial qualifications ab initio (see Argument I, supra), changes in her financing plan do not constitute improper upgrading. Cf. Lynn Broadcasting, 8 FCC Rcd 6719 at note 2 (1993) (post-designation change not improper where original showing was adequate). Moreover, Selznick's failure to file the Amendment to report changes in her financial plan could result in the addition of Rule 1.65 reporting issues. See Weyburn Broadcasting L.P., 984 F. 2d 1220 (D.C. Cir. 1993) (FM proceeding remanded for trial on, inter alia, applicant's failure to update application as to financial plans).

^{13/} Selznick's August 30, 1993 Amendment, first reporting the changes to Selznick's financing plan, was submitted within 30 days of the change being reported. See 47 CFR § 1.65.

^{14/} The Revised Amendment is consistent with Selznick's Direct Case Written Testimony, which was received into evidence by the Presiding Judge on January 12, 1994, at the same hearing where Mr. Clanton cross-examined Ms. Selznick.

advantage by its acceptance. ^{15/} In sum, the "good cause" test is met by the Revised Amendment. See Las Americas, Inc., 5 FCC Rcd 1634, 1637 (1990) ("good cause" test not rigidly applied when other public interest factors are present).

66. In this case, however, the Revised Amendment should be accepted whether it technically meets the "good cause" test or not. Indeed, the rejection of Selznick's Revised Amendment would be arbitrary and capricious for two separate reasons.

67. First, rejection of the Revised Amendment would depart arbitrarily from established FCC precedent. The FCC long has favored the opportunity to choose between two or more competing applicants in awarding broadcast spectrum. Cf. Golden Shores Broadcasting, Inc., 2 FCC Rcd 4743 (1987) (FCC has strong interest in maximizing the "pool" of applicants for a new FM station). In this case, the failure to accept Selznick's Revised Amendment would likely lead to Selznick's disqualification and, by default, the grant of Clanton's application. The Commission has recognized that, in appropriate cases, its statutory mandates are best achieved by accepting an amendment vel non when to do so will remove a potentially disqualifying defect. See Anax Broadcasting, Inc., 87 FCC 2d 483, 488-89 (1981). Indeed, the Commission even has granted an applicant's third financial amendment when it furthered the ends of justice ^{16/} and best served the FCC's

^{15/} It long has been clear that an opponent such as Mr. Clanton has no vested interest in the disqualification of his competitor. See Azalea Corp., 31 FCC 2d 561 (1971).

^{16/} See 47 USC § 154(j).

statutory purposes. See Bison City TV 49 Partnership, 91 FCC 2d 26, 30 (Rev. Bd. 1982). In this two-party proceeding, acceptance of the Revised Amendment will best serve the public interest by preserving a choice between applicants. Accord WCTO, Inc., supra.

68. Second, the failure to accept Selznick's Revised Amendment also would undermine the FCC's policy in requiring applicants to both tell the truth and report changes to their proposals within 30 days of their occurrences. See 47 CFR §§ 1.17 and 1.65(a). As detailed in her Revised Amendment, supra, Ms. Selznick's proposals for both (i) constructing and initially operating the El Rio station and (ii) financing the construction/initial operation were altered during and following settlement discussions with Mr. Clanton. In discussing a possible merger, Ms. Selznick and Mr. Clanton agreed that circumstances in the radio market would require that the El Rio station be constructed and operated in a far different manner than Selznick had proposed in her 1991 application. Id. Thus, following her discussions with Mr. Clanton, Ms. Selznick consulted numerous experts about the El Rio project following the collapse of settlement talks with Mr. Clanton. Id. She was told by the experts that her original cost budget was unrealistically high. Id. She concluded, therefore, that she had no choice but to change her proposal to the FCC because, if she was the successful applicant, she would never build the El Rio station with a \$360,070 budget. Id. Following the advice of these experts and because of these changed circumstances, Selznick followed FCC rules and amended

her FCC application within 30 days of the occurrence. See 47 CFR § 1.65. It would be arbitrary and capricious for the Commission to disallow such "honest" and "real world" changes to applicants' proposals. See Bechtel v FCC, D.C. Cir. No. 92-1378, decided December 17, 1993. In the interest of eliminating artificialities in the FCC's comparative hearing process, Selznick's Revised Amendment should be accepted. Id.

69. Once the Revised Amendment is accepted, Selznick's present financial qualification is established.

CONCLUSION

The added issues should be resolved in favor of Selznick and the contingent forfeiture proceeding should be dismissed.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert L. Thompson". The signature is written in a cursive, flowing style.

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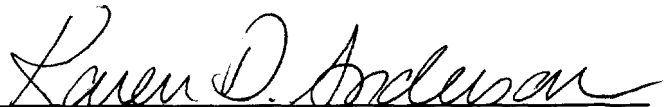
March 4, 1994

Counsel for Loren F. Selznick

CERTIFICATE OF SERVICE

I, Karen D. Anderson, do certify that a copy of the foregoing "Proposed Findings of Fact and Conclusions of Law on the Added Issues" was served by prepaid, First Class U.S. Mail on this 4th day of March 1994, on the following:

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